

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

CHERYL R. SUNDAY,	)
	) No. CV-07-3085-JPH
Plaintiff,	)
	) ORDER GRANTING DEFENDANT'S
v.	) MOTION FOR SUMMARY JUDGMENT
	)
MICHAEL J. ASTRUE, Commissioner	)
of Social Security,	)
	)
Defendant.	)
	)
	)

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BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on October 13, 2008. (Ct. Rec. 16, 21). Attorney Thomas A. Bothwell represents Plaintiff; Special Assistant United States Attorney L. Jamala Edwards represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) On August 20, 2008, Plaintiff filed a reply. (Ct. Rec. 23.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 21) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 16.)

**JURISDICTION**

Plaintiff filed applications for SSI benefits on April 26, 2004, and for disability insurance benefits (DIB) on June 9, 2004

1 (Tr. 313), alleging onset as of July 1, 2003. (Tr.94-96, 309-  
2 312.) The applications were denied initially and on  
3 reconsideration. (Tr. 40-44, 314-317A.) Administrative Law Judge  
4 (ALJ) Mary Bennett Reed held a hearing on September 11, 2006.  
5 (Tr. 319-361.) Plaintiff, represented by counsel, medical expert  
6 R. Thomas McKnight, Ph.D., and vocational expert Dennis J. Elliott  
7 testified. Following and based on Dr. McKnight's testimony, the  
8 ALJ ordered a consultative examination of plaintiff by Emma  
9 Billings, Ph.D., after the hearing. (Tr. 80, Exhibit 15F.) The  
10 ALJ submitted interrogatories to Dr. McKnight with Dr. Billings'  
11 report. (Tr. 84.) On March 22, 2007, the ALJ issued a decision  
12 finding that plaintiff was not disabled. (Tr. 17-34.) The  
13 Appeals Council denied a request for review on July 26, 2007.  
14 (Tr. 5-7.) Therefore, the ALJ's decision became the final  
15 decision of the Commissioner, which is appealable to the district  
16 court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action  
17 for judicial review pursuant to 42 U.S.C. § 405(g) on October 1,  
18 2007. (Ct. Rec. 1,4.)

#### 19 **STATEMENT OF FACTS**

20 The facts have been presented in the administrative hearing  
21 transcript, the ALJ's decision, the briefs of both Plaintiff and  
22 the Commissioner, and will only be summarized here.

23 Plaintiff was 47 years old on the date of the decision. She  
24 earned a GED and completed one year of college, resulting in  
25 obtaining an accounting certificate. (Tr. 117, 128, 271, 350.)  
26 Plaintiff has past work as a greeter, pizza deliverer, sorter, and  
27 cashier. (Tr. 329; 338-339.) She alleges disability as of July  
28

1 1, 2003, due to concentration problems, depression, frequent panic  
2 attacks, and headaches. (Tr. 111, 118, 340-346.)

### 3 SEQUENTIAL EVALUATION PROCESS

4 The Social Security Act (the "Act") defines "disability"  
5 as the "inability to engage in any substantial gainful activity by  
6 reason of any medically determinable physical or mental impairment  
7 which can be expected to result in death or which has lasted or  
8 can be expected to last for a continuous period of not less than  
9 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The  
10 Act also provides that a Plaintiff shall be determined to be under  
11 a disability only if any impairments are of such severity that a  
12 plaintiff is not only unable to do previous work but cannot,  
13 considering plaintiff's age, education and work experiences,  
14 engage in any other substantial gainful work which exists in the  
15 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
16 Thus, the definition of disability consists of both medical and  
17 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
18 (9<sup>th</sup> Cir. 2001).

19 The Commissioner has established a five-step sequential  
20 evaluation process for determining whether a person is disabled.  
21 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
22 is engaged in substantial gainful activities. If so, benefits are  
23 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If  
24 not, the decision maker proceeds to step two, which determines  
25 whether plaintiff has a medically severe impairment or combination  
26 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
27 416.920(a)(4)(ii).

1 If plaintiff does not have a severe impairment or combination  
2 of impairments, the disability claim is denied. If the impairment  
3 is severe, the evaluation proceeds to the third step, which  
4 compares plaintiff's impairment with a number of listed  
5 impairments acknowledged by the Commissioner to be so severe as to  
6 preclude substantial gainful activity. 20 C.F.R. §§  
7 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
8 App. 1. If the impairment meets or equals one of the listed  
9 impairments, plaintiff is conclusively presumed to be disabled.  
10 If the impairment is not one conclusively presumed to be  
11 disabling, the evaluation proceeds to the fourth step, which  
12 determines whether the impairment prevents plaintiff from  
13 performing work which was performed in the past. If a plaintiff  
14 is able to perform previous work, that Plaintiff is deemed not  
15 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).  
16 At this step, plaintiff's residual functional capacity ("RFC")  
17 assessment is considered. If plaintiff cannot perform this work,  
18 the fifth and final step in the process determines whether  
19 plaintiff is able to perform other work in the national economy in  
20 view of plaintiff's residual functional capacity, age, education  
21 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
22 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

23 The initial burden of proof rests upon plaintiff to establish  
24 a *prima facie* case of entitlement to disability benefits.  
25 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
26 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
27 met once plaintiff establishes that a physical or mental  
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1 impairment prevents the performance of previous work. The burden  
2 then shifts, at step five, to the Commissioner to show that (1)  
3 plaintiff can perform other substantial gainful activity and (2) a  
4 "significant number of jobs exist in the national economy" which  
5 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
6 Cir. 1984).

7 Plaintiff has the burden of showing that drug and alcohol  
8 addiction (DAA) is not a contributing factor material to  
9 disability. *Ball v. Massanari*, 254 F. 3d 817, 823 (9<sup>th</sup> Cir.  
10 2001). The Social Security Act bars payment of benefits when drug  
11 addiction and/or alcoholism is a contributing factor material to a  
12 disability claim. 42 U.S.C. §§ 423 (d)(2)(C) and 1382(a)(3)(J);  
13 *Sousa v. Callahan*, 143 F. 3d 1240, 1245 (9<sup>th</sup> Cir. 1998). If there  
14 is evidence of DAA and the individual succeeds in proving  
15 disability, the Commissioner must determine whether the DAA is  
16 material to the determination of disability. 20 C.F.R. §§  
17 404.1535 and 416.935. If an ALJ finds that the claimant is not  
18 disabled, then the claimant is not entitled to benefits and there  
19 is no need to proceed with the analysis to determine whether  
20 substance abuse is a contributing factor material to disability.  
21 However, if the ALJ finds that the claimant is disabled, then the  
22 ALJ must proceed to determine if the claimant would be disabled if  
23 he or she stopped using alcohol or drugs.

#### 24 STANDARD OF REVIEW

25 Congress has provided a limited scope of judicial review of a  
26 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
27 the Commissioner's decision, made through an ALJ, when the  
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1 determination is not based on legal error and is supported by  
2 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995  
3 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir.  
4 1999). "The [Commissioner's] determination that a plaintiff is  
5 not disabled will be upheld if the findings of fact are supported  
6 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572  
7 (9<sup>th</sup> Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence  
8 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d  
9 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
10 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
11 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
12 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
13 evidence as a reasonable mind might accept as adequate to support  
14 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
15 (citations omitted). "[S]uch inferences and conclusions as the  
16 [Commissioner] may reasonably draw from the evidence" will also be  
17 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965).  
18 On review, the Court considers the record as a whole, not just the  
19 evidence supporting the decision of the Commissioner. *Weetman v.*  
20 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (*quoting Kornock v.*  
21 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

22       It is the role of the trier of fact, not this Court, to  
23 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
24 evidence supports more than one rational interpretation, the Court  
25 may not substitute its judgment for that of the Commissioner.  
26 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
27 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by  
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1 substantial evidence will still be set aside if the proper legal  
2 standards were not applied in weighing the evidence and making the  
3 decision. *Browner v. Secretary of Health and Human Services*, 839  
4 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial  
5 evidence to support the administrative findings, or if there is  
6 conflicting evidence that will support a finding of either  
7 disability or nondisability, the finding of the Commissioner is  
8 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
9 1987).

#### 10 **ALJ'S FINDINGS**

11 At the outset, the ALJ found plaintiff met the DIB  
12 requirements through September 30, 2007. (Tr. 17.) The ALJ found  
13 at step one that plaintiff has not engaged in substantial gainful  
14 activity since onset. (Tr. 20.) At steps two and three, the ALJ  
15 found that plaintiff suffers from marijuana abuse/addiction and  
16 marijuana-induced anxiety disorder, impairments that are severe  
17 but which do not alone or combination meet or medically equal a  
18 Listing impairment. (Tr. 20-21.) Prior to step four, the ALJ  
19 found plaintiff has no exertional limitations. (Tr. 20.) When  
20 substance abuse is considered, plaintiff's mental impairments  
21 cause moderate impairment in the ability to: (1) remember  
22 locations and work-like procedures; (2) understand, remember and  
23 carry out detailed instructions; (3) perform activities within a  
24 schedule, maintain regular attendance, and be punctual within  
25 customary tolerances; (4) work in coordination with or proximity  
26 to others without being distracted by them; (5) complete a normal  
27 workday and workweek without interruptions from psychologically  
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1 based symptoms; (6) perform at a consistent pace without an  
2 unreasonable number and length of rest periods; (6) accept  
3 instructions and respond appropriately to criticism from  
4 supervisors; (7) get along with co-workers or peers without  
5 distracting them or exhibiting behavioral extremes; (8) respond  
6 appropriately to changes in the work setting; and (9) set  
7 reasonable goals or make plans independently of others. (Tr. 21.)  
8 The ALJ found plaintiff less than completely credible. (Tr. 24-  
9 30.) At step four, the ALJ found that when substance abuse is  
10 included, plaintiff is unable to perform her past relevant work.  
11 (Tr. 31.) At step five, the ALJ found that with substance abuse,  
12 there are no other jobs plaintiff could perform. (Tr. 31-32.)  
13 Because the ALJ found plaintiff incapable of work, she was  
14 disabled. The ALJ then considered, pursuant to *Bustamante v.*  
15 *Massanari*, if plaintiff would be disabled if she stopped abusing  
16 substances. (Tr. 33.) The ALJ concluded at step two that  
17 plaintiff would have no severe impairments or combination of  
18 impairments preventing employment if substance abuse stopped.  
19 (*Id.*) Accordingly, the ALJ found that plaintiff is not disabled as  
20 defined by the Social Security Act.

#### 21 ISSUES

22 Plaintiff contends that the Commissioner erred as a matter of  
23 law by failing to properly credit the opinion of (1) treating  
24 physician Karen Thomas, M.D.; (2) examining psychologist  
25 Jacqueline Sallade, Ed. D.; (3) treating physician Cyrill Puhalla,  
26 M.D.; (4) treating therapist Sylvia Macias, and therapist Melissa  
27 Morfin; and (5) treating nurse practitioner Anne English, ARNP.



1 (Ct. Rec. 17 at 1, 5-14.) Plaintiff alleges the ALJ improperly  
2 credited the opinion of examining psychologist Emma Billings,  
3 Ph.D., and of testifying expert R. Thomas McKnight, Ph.D., whose  
4 opinions were entitled to less weight. Plaintiff alleges the ALJ  
5 also erred in her alternative step two analysis by finding no  
6 severe impairment when substance abuse is excluded. (Ct. Recs. 17  
7 at 15-19, 23 at 1-2.)

8 The Commissioner responds that the ALJ appropriately weighed  
9 the medical evidence of psychological impairment and asks the  
10 Court to affirm the decision. (Ct. Rec. 22 at 6-10). Plaintiff's  
11 second argument is subsumed by the first.

## 12 DISCUSSION

### 13 A. Weighing medical evidence

14 In social security proceedings, the claimant must prove the  
15 existence of a physical or mental impairment by providing medical  
16 evidence consisting of signs, symptoms, and laboratory findings;  
17 the claimant's own statement of symptoms alone will not suffice.  
18 20 C.F.R. § 416.908. The effects of all symptoms must be  
19 evaluated on the basis of a medically determinable impairment  
20 which can be shown to be the cause of the symptoms. 20 C.F.R. §  
21 416.929. Once medical evidence of an underlying impairment has  
22 been shown, medical findings are not required to support the  
23 alleged severity of symptoms. *Bunnell v. Sullivan*, 947, F. 2d  
24 341, 345 (9<sup>th</sup> Cr. 1991).

25 A treating physician's opinion is given special weight  
26 because of familiarity with the claimant and the claimant's  
27 physical condition. *Fair v. Bowen*, 885 F. 2d 597, 604-05 (9<sup>th</sup>  
28

1 Cir. 1989). However, the treating physician's opinion is not  
2 "necessarily conclusive as to either a physical condition or the  
3 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,  
4 751 (9<sup>th</sup> Cir. 1989) (citations omitted). More weight is given to  
5 a treating physician than an examining physician. *Lester v.*  
6 *Cater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1996). Correspondingly, more  
7 weight is given to the opinions of treating and examining  
8 physicians than to nonexamining physicians. *Benecke v. Barnhart*,  
9 379 F. 3d 587, 592 (9<sup>th</sup> Cir. 2004). If the treating or examining  
10 physician's opinions are not contradicted, they can be rejected  
11 only with clear and convincing reasons. *Lester*, 81 F. 3d at 830.  
12 If contradicted, the ALJ may reject an opinion if he states  
13 specific, legitimate reasons that are supported by substantial  
14 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44  
15 F. 3d 1435, 1463 (9<sup>th</sup> Cir. 1995).

16 In addition to the testimony of a nonexamining medical  
17 advisor, the ALJ must have other evidence to support a decision to  
18 reject the opinion of a treating physician, such as laboratory  
19 test results, contrary reports from examining physicians, and  
20 testimony from the claimant that was inconsistent with the  
21 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,  
22 751-52 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9<sup>th</sup>  
23 Cir. 1995).

24 Plaintiff contends that the ALJ failed to properly credit  
25 the opinion of treating physician Dr. Thomas that plaintiff's  
26 primary diagnosis is depression, and secondarily, anxiety. (Ct.  
27 Rec. 17 at 8-9, referring to ALJ at 23-24.) The ALJ gave little  
28 weight to Dr. Thomas' contradicted opinions because the doctor:

1 (1) performed no objective mental health testing; (2) saw  
2 plaintiff on only four occasions (7/14/04, 8/16/04, 9/21/04 and  
3 12/27/04); (3) failed to diagnose a condition meeting the 12 month  
4 durational requirement, and (4) failed to take into account  
5 plaintiff's substance abuse. These are specific and legitimate  
6 reasons supported by the record for finding Dr. Thomas's opinion  
7 entitled to little weight.

8 Jacqueline Sallade, Ed. D., examined plaintiff on September  
9 8, 2004. (Tr. 175.) She diagnosed PTSD, panic disorder with  
10 agoraphobia, dysthymic disorder, and mixed personality disorder  
11 with borderline and dependent features. (Tr. 178.) The ALJ  
12 rejected Dr. Sallade's contradicted opinions because she saw  
13 plaintiff once, had no records to review in forming her opinion,  
14 was unaware of plaintiff's ongoing substance abuse, and her  
15 opinion appeared to be based primarily on plaintiff's self-report.  
16 (Tr. 24.)

17 To aid in weighing the conflicting medical evidence, the ALJ  
18 evaluated plaintiff's credibility and found her less than fully  
19 credible. (Tr. 24-31.) Credibility determinations bear on  
20 evaluations of medical evidence when an ALJ is presented with  
21 conflicting medical opinions or inconsistency between a claimant's  
22 subjective complaints and diagnosed condition. *See Webb v.*  
23 *Barnhart*, 433 F. 3d 683, 688 (9<sup>th</sup> Cir. 2005).

24 It is the province of the ALJ to make credibility  
25 determinations. *Andrews v. Shalala*, 53 F. 3d 1035, 1039 (9<sup>th</sup> Cir.  
26 1995). However, the ALJ's findings must be supported by specific  
27 cogent reasons. *Rashad v. Sullivan*, 903 F. 2d 1229, 1231 (9<sup>th</sup>  
28 Cir. 1990). Once the claimant produces medical evidence of an

1 underlying medical impairment, the ALJ may not discredit testimony  
2 as to the severity of an impairment because it is unsupported by  
3 medical evidence. *Reddick v. Chater*, 157 F. 3d 715, 722 (9<sup>th</sup> Cir.  
4 1998). Absent affirmative evidence of malingering, the ALJ's  
5 reasons for rejecting the claimant's testimony must be "clear and  
6 convincing." *Lester v. Chater*, 81 F. 3d 821, 834 (9<sup>th</sup> Cir. 1995).  
7 "General findings are insufficient: rather the ALJ must identify  
8 what testimony not credible and what evidence undermines the  
9 claimant's complaints." *Lester*, 81 F. 3d at 834; *Dodrill v.*  
10 *Shalala*, 12 F. 3d 915, 918 (9<sup>th</sup> Cir. 1993).

11 The ALJ relied on several factors when she assessed  
12 plaintiff's credibility: the extent of plaintiff's daily  
13 activities, multiple inconsistent statements, and the lack of  
14 medical support for claimed significant physical limitations.  
15 (Tr. 30-31.) The ALJ cites Exhibit 15F, indicating plaintiff's  
16 activities in January of 2007 included getting her grandson up,  
17 ready, and driving him to school, watching television, cleaning,  
18 doing laundry, baking, assisting in caring for her grandson after  
19 school, grocery shopping with her spouse, often socializing with  
20 family, sewing, and helping her spouse restore automobiles. (Tr.  
21 29, referring to Tr. 272.) The ALJ notes that at the hearing [on  
22 September 11, 2006], plaintiff reported significant physical  
23 limitations. (Tr. 30.)

24 The ALJ observes that in September of 2004 [at about age 45]  
25 plaintiff told Dr. Sallade she had a history of drug and alcohol  
26 use, but not since age 20. (Tr. 24, referring to Exhibit 5F at  
27 Tr. 176.) In January of 2005, plaintiff admitted to Ms. English  
28 she uses marijuana one to three days a week and to Dr. Puhalla she

1 occasionally smokes marijuana. (Tr. 23, referring to Tr. 209,  
2 238.) The ALJ notes that plaintiff testified to significant  
3 physical limitations. The record does not reflect treatment for  
4 these problems. Plaintiff has denied physical problems several  
5 times. (Tr. 30, referring to Exhibits 3F/5 and 10F.)

6 The ALJ's reasons for finding plaintiff less than fully  
7 credible are clear, convincing, and fully supported by the record.  
8 *See Thomas v. Barnhart*, 278 F. 3d 947, 958-959 (9<sup>th</sup> Cir.  
9 2002)(proper factors include inconsistencies in plaintiff's  
10 statements, inconsistencies between statements and conduct, and  
11 extent of daily activities). Noncompliance with medical care or  
12 unexplained or inadequately explained reasons for failing to seek  
13 medical treatment also cast doubt on a claimant's subjective  
14 complaints. 20 C.F.R. §§ 404.1530, 426.930; *Fair v. Bowen*, 885 F.  
15 2d 597, 603 (9<sup>th</sup> Cir. 1989).

16 The ALJ properly discounted several medical opinions based on  
17 plaintiff's unreliable self-reporting, including the September 9,  
18 2004 opinion of examining psychologist Dr. Sallade. The ALJ notes  
19 Dr. Sallade diagnosed PTSD which was not diagnosed by other  
20 treating or evaluating professionals, and her opinion was  
21 undermined by the results of Dr. Billings' objective testing.  
22 (Tr. 24.) These are specific legitimate reasons supported by  
23 substantial evidence for the weight given to Dr. Sallade's  
24 opinion.

25 The ALJ accorded some weight to Dr. Puhalla's 2005 opinion,  
26 "to the extent it reflects difficulties when the claimant is using  
27 substances." (Tr. 25.) At her first appointment on January 26,  
28 2005, plaintiff denied current alcohol or drug use, but admitted

1 current occasional marijuana use. (Tr. 239.) Dr. Puhalla assessed  
2 bipolar disorder, nos, panic disorder with agoraphobia, and prior  
3 polysubstance abuse. (Tr. 24, referring to Exhibit 10F.) The ALJ  
4 notes that active substance abuse is especially relevant to a  
5 bipolar diagnosis (as mood swings can be related to substance use)  
6 or anxiety disorder. (Tr. 25.) At the first visit, Dr. Puhalla  
7 changed plaintiff's medication. At the second and final visit  
8 about a month later, on February 23, 2005, plaintiff's medications  
9 were changed again. (Tr. 241.) The ALJ points out that Dr.  
10 Puhalla's assessment appears based primarily on plaintiff's  
11 discredited self-reporting and included no record review. The ALJ  
12 notes the finding that plaintiff was "alert with good memory of  
13 average intelligence, memory and concentration," despite a global  
14 assessment of functioning of 45.<sup>1</sup> (Tr. 24.) The ALJ's reasons  
15 for discrediting some of Dr. Puhalla's assessed limitations are  
16 specific, legitimate, and fully supported by the record.

17 The ALJ rejected the May 2005 opinion of therapist Sylvia  
18 Macias and another mental health therapist, whose name is not  
19 identifiable:

20 [the therapists] reported she had significant memory deficits  
21 due to her anxiety and depression and she reported difficulty  
22 being around others. Alcohol and  
23 drug use was not a factor. They diagnosed major  
24 depression and anxiety disorder, nos. Marked and  
25 moderate social and cognitive limits were assessed.  
26 This opinion is accorded no weight for several reasons.  
27 First, it is noted that the examiners were counselors,  
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25 <sup>1</sup>A Global Assessment of Functioning (GAF) of 45 indicates  
26 serious symptoms (e.g., suicidal ideation, severe obsessional  
27 rituals, frequent shoplifting) or any serious impairment in  
28 social, occupational, or school functioning (e.g., no friends,  
unable to keep a job). DIAGNOSTIC AND STATISTICAL MANUAL OF  
MENTAL DISORDERS FOURTH EDITION (DSM -IV), at p. 32.

1 not psychologists or psychiatrists. Second, they had  
2 no longitudinal records to review in basing their  
3 opinion on a one-time evaluation. Third, their  
4 assessment was based solely on the claimant's self-  
5 report, as no objective testing was administered, yet  
6 the claimant is not credible and exaggerates. Fourth,  
7 it is contradicted by other medical opinion evidence.  
8 Finally they were not aware that the claimant was  
9 using marijuana which could have influenced their  
10 assessment.

11 (Tr. 25.) The ALJ rejected the June 2005 opinion of John McRae,  
12 Ph. D. (Exhibit 8F at Tr. 199), because it was evidently based on  
13 the discredited report of Ms. Macias. (Tr. 25.)

14 The ALJ notes plaintiff began mental health treatment with  
15 Anne English, ARNP, in July of 2005. (Tr. 25, citing Exhibit  
16 9F/9-12). The ALJ observes inconsistencies between plaintiff's  
17 intake responses and self-reporting elsewhere in the record.  
18 Plaintiff told Ms. English she used cocaine, crank, and marijuana  
19 a great deal as a teenager and currently used marijuana for sleep,  
20 but, the ALJ notes, plaintiff did not say how much she used. (Tr.  
21 25.) Plaintiff reported current olfactory and visual  
22 hallucinations; the ALJ notes plaintiff denied psychotic symptoms  
23 in February of 2005. (Tr. 26, comparing Tr. 214 with Tr. 241.)  
24 The ALJ points out plaintiff told Ms. English she was given a CT  
25 scan due to olfactory hallucinations. Medical records indicate  
26 the scan was performed because plaintiff complained of syncope,  
27 collapse, and dizziness. (Tr. 25-26, Cf. Tr. 209 with Tr. 162.)  
28 The ALJ notes other areas of inconsistencies in plaintiff's  
reporting to Ms. English, including descriptions of physical and  
mental abuse as a child, of her family's history of mental  
illness, and of numerous past suicide attempts, all of which are  
directly contradicted by plaintiff's statements elsewhere or are

1 unsupported by the record. (Tr. 26.) Ms. English diagnosed a  
2 generalized anxiety disorder, panic disorder with agoraphobia, and  
3 major depression; rule out cannabis dependence and mood disorder  
4 due to head trauma/tumor. She prescribed vistaril and cymbalta.  
5 (Tr. 26, citing Exhibit 9F.)

6 The ALJ observes that by late July of 2005, Ms. English notes  
7 plaintiff was smiling, laughing and more relaxed with improved  
8 sleep. Treatment continued with several medication changes  
9 through April of 2006. (Tr. 26, referring to Exhibit 9F.) The  
10 ALJ gave some weight to Ms. English's assessment in August of 2006  
11 that plaintiff suffered moderate and marked limitations, when  
12 substance abuse is included. (Tr. 27, referring to Exhibit 12F.)  
13 The ALJ did not credit the opinion when DAA is excluded because  
14 Ms. English indicated that "substance abuse issues never came up,"  
15 her assessments are contradicted by Dr. Billings' objective tests,  
16 the opinion appears based on plaintiff's unreliable self-  
17 reporting, and Ms. English is a not a psychiatrist or  
18 psychologist. (Tr. 27.) The ALJ similarly discredited the opinion  
19 rendered the same day by therapist Melissa Morfin as based on  
20 plaintiff's reporting, her status as a therapist, and Ms. Morfin's  
21 statement that "Client's report of marijuana use has never come up  
22 as a problem in regards to both medical and/or psychiatric." (Tr.  
23 27, citing Exhibit 11F/2.) The ALJ's reasons are specific,  
24 legitimate, and fully supported.

25 The ALJ relied on the January 2007 results of Dr. Billings'  
26 testing. (Tr. 27 referring to Exhibit 15F.) Testing showed  
27 average to superior memory, and exaggeration but not malingering.  
28 Dr. Billings diagnosed a cannabis-induced anxiety disorder,



1 bipolar disorder II, and personality disorder with dependent and  
2 histrionic characteristics. (Tr. 276.) The ALJ notes:

3 She opined the claimant had no memory deficits. It  
4 was opined her anxiety was related to her marijuana  
5 abuse [and] has been present since her anxiety symptoms  
6 were reported<sup>2</sup>. Based on the claimant's substance abuse  
7 and reported anxiety, Dr. Billings assessed a moderate  
8 limitation on the claimant's ability to work with or  
9 near others without being distracted by them; and to set  
10 realistic goals and make plans independently of others.  
11 Based on the claimant's reported history, she also  
12 assessed a moderate limitation in accepting instructions  
13 and responding appropriately to criticism from supervisors.  
14 A moderate limitation was also assessed  
15 in maintaining socially appropriate behavior based on  
16 the claimant's [observed] hand wringing. She  
17 specifically noted that symptom exaggeration and  
18 substance abuse contributed to the claimant's  
19 limitations. Drug testing administered the next day  
20 was negative for drug use.

21 Tr. 28.)

22 The ALJ points out that test results showed no difficulties  
23 with concentration, persistence, memory or pace. The negative  
24 drug screen supports the inference that, absent such use,  
25 plaintiff's functional deficits are minimal. (Tr. 28.)

26 The ALJ considered and relied on the opinion of Dr.  
27 McKnight, who reviewed the complete medical record, including Dr.  
28 Billing's assessment. (Tr. 28-29.) The ALJ notes Dr. McKnight  
concluded plaintiff's anxiety and depression were related to her  
marijuana use. He opined that she has borderline and histrionic  
personality features, but does not meet the diagnostic criteria  
for a personality disorder. Dr. McKnight noted plaintiff has been

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<sup>2</sup>Dr. Billings stated: "It is my opinion that her anxiety  
may be attributed to her use of marijuana. She states that  
her marijuana use has continued for approximately two years, which  
is the same reported time that her anxiety has been present." (Tr.  
276.)

1 able to work in the past despite these characteristics. He  
2 opined that there is no support for diagnosing a bipolar or panic  
3 disorder, other than plaintiff's self-report. (Tr. 283.) The ALJ  
4 indicates Dr. McKnight opined that Dr. Billings did not note any  
5 personality factors that impacted functioning, and performance on  
6 memory testing was excellent, undercutting plaintiff's memory  
7 complaints. Dr. McKnight pointed out that there is no indication  
8 of serious behavior problems; plaintiff's daily activities,  
9 including the ability to care for her grandson, reflect a lack of  
10 serious impairment. The ALJ notes Dr. McKnight's opinion that the  
11 medical evidence does not support problems with panic attacks,  
12 depression, hallucinations, or attending and concentrating. Dr.  
13 McKnight concluded that impairments diagnosed in the past were  
14 primarily based on self-reporting with scant attention given to  
15 drug use. (Tr. 29, referring to Exhibit 16F.) He opined that,  
16 absent drug use, plaintiff has no limitations in functioning.

17 The ALJ notes plaintiff's testimony that she thought her  
18 panic attacks began around 2001, they came on when she was in  
19 crowds, and required her to take a break for about 15 minutes.  
20 (Tr. 29.) After the panic attacks started, plaintiff began having  
21 concentration problems. The ALJ notes testimony describing  
22 visual and olfactory hallucinations. The ALJ found plaintiff was  
23 credible only to the extent she described her limitations when  
24 substance abuse is included. (Tr. 30.) As noted, the ALJ found  
25 plaintiff disabled when DAA is included.

26 It is the plaintiff's burden to show that DAA is not material  
27 to the disability determination. *Ball v. Massanari*, 254 F. 3d  
28 817, 823 (9<sup>th</sup> Cir. 2001). Plaintiff has not met her burden.

1 **B. Alternative step two finding**

2 Plaintiff argues the ALJ erred in her alternative step two  
3 analysis by finding that, absent substance abuse, plaintiff  
4 suffers no severe impairment. The ALJ found plaintiff's severe  
5 impairments include marijuana abuse and a marijuana induced  
6 anxiety disorder. When substance abuse is excluded, plaintiff  
7 does not suffer from severe impairments. Plaintiff's second  
8 argument, that the ALJ erred by failing to find a severe  
9 impairment when DAA is excluded, is subsumed by the first,  
10 challenging the weight the ALJ gave to all of the medical opinion  
11 evidence.

12 The ALJ relied on evidence in addition to the testimony of  
13 the nonexamining medical expert in rejecting some of the other  
14 medical opinions. This additional evidence included the opinion  
15 of examining psychologist Dr. Billings, who performed objective  
16 testing, plaintiff's lack of credibility, and rejecting the  
17 opinions of health professionals who based their opinions on  
18 plaintiff's unreliable self-reporting.

19 The ALJ is responsible for reviewing the evidence and  
20 resolving conflicts or ambiguities in testimony. *Magallanes v.*  
21 *Bowen*, 881 F. 2d 747, 751 (9<sup>th</sup> Cir. 1989). It is the role of the  
22 trier of fact, not this court, to resolve conflicts in evidence.  
23 *Richardson*, 402 U.S. at 400. The court has a limited role in  
24 determining whether the ALJ's decision is supported by substantial  
25 evidence and may not substitute its own judgment for that of the  
26 ALJ, even if it might justifiably have reached a different result  
27 upon de novo review. 42 U.S.C. § 405 (g).

28 The ALJ provided clear and convincing reasons supported by

1 the record for finding plaintiff's allegations not fully credible.  
2 The ALJ weighed the medical evidence and failed to adopt some of  
3 the opinions of some treating and examining professionals.  
4 Instead, the ALJ relied on the opinions of other examining and  
5 consulting physicians and on her assessment of plaintiff's  
6 credibility. The ALJ gave specific and  
7 legitimate reasons, supported by substantial evidence, for  
8 rejecting some of the diagnoses and assessed limitations. The  
9 ALJ's assessment of the medical and other evidence is supported  
10 by the record and free of legal error.

11 **CONCLUSION**

12 Having reviewed the record and the ALJ's conclusions, this  
13 court finds that the ALJ's decision is free of legal error and  
14 supported by substantial evidence..

15 **IT IS ORDERED:**

16 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 21**) is  
17 **GRANTED.**

18 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 16**) is  
19 **DENIED.**

20 The District Court Executive is directed to file this Order,  
21 provide copies to counsel for Plaintiff and Defendant, enter  
22 judgment in favor of Defendant, and **CLOSE** this file.

23 DATED this 6th day of November, 2008.

24 s/ James P. Hutton

25 JAMES P. HUTTON  
26 UNITED STATES MAGISTRATE JUDGE  
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